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BY HAND AND ELECTRONIC MAIL

Mary Cottrell, Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Re: D.T.E. 03-60

Dear Secretary Cottrell:

I write on behalf of AT&T to address a specific concern raised in the March 4 procedural memorandum issued by the Department, and to supplement AT&T's opposition to Verizon's motion to stay. In its procedural memorandum, the Department requested comment regarding the jurisdictional basis for continuing the investigations in this proceeding. In addition to the authority under both federal and state law to implement unbundling requirements, as discussed in AT&T's opposition to Verizon's motion to stay, the Department has jurisdiction to continue its factual investigations in this proceeding under its power to ensure that Verizon's retail rates are just and reasonable.

Even if it were correct that the theoretical future absence of an FCC standard for impairment would somehow both rob the states of authority to implement the Telecommunications Act of 1996 and preempt the states from enforcing their own unbundling requirements under state law, which it is not, the Department would still have jurisdiction to continue the investigation it began in this proceeding. As explained below, the Department's jurisdiction is conferred by G.L. c. 159, which authorizes and requires the Department to ensure that Verizon's retail rates are just and reasonable.

In the absence of competition, "just and reasonable" telephone rates are assured by regulation of the monopoly provider. However, it has been a fundamental tenant of Department policy since 1985 that, where competition is sufficient to discipline retail rates, regulation of them may be relaxed.¹ Indeed, in D.T.E. 01-31, the Department reviewed the state of competition and determined that, given CLEC access to unbundled

¹ D.P.U. 1731, at 64-70.

network elements, competition will be sufficient to discipline retail rates for business end users and, expressly on that basis, essentially price deregulated Verizon's retail rates for business services.²

If CLECs were denied access to unbundled elements necessary for them to compete sufficiently to assure retail rates that the Department deems just and reasonable under state law, the Department has jurisdiction and, indeed, the responsibility to reregulate Verizon's retail rates. The sole basis for the retail pricing flexibility granted to Verizon in Docket D.T.E. 01-31 was that certain Verizon retail offerings are adequately contestable by CLECs competing through use of unbundled network elements. To the extent that the ability of CLECs to compete using UNEs were ever diminished, the Department would have to determine whether the resulting level of competition remains sufficient to assure just and reasonable retail rates.³ If states were ever precluded from requiring access to UNEs, which they have not been, then the Department would once again have to ensure the reasonableness of Verizon's retail rates by direct regulation.

The factual inquiry necessary to determine whether competition is sufficient in the absence of unbundled access to assure just and reasonable retail rates is essentially the same inquiry involved in determining whether CLEC market entry would be impaired without access to UNEs. Both inquiries involve assessing the level of competition and the ability of CLECs to enter the market and compete that would exist in the absence of access to unbundled elements.

The Department retains complete and exclusive jurisdiction to determine whether CLEC impairment in the absence of access to UNEs, even if, *arguendo*, not sufficient to warrant unbundled access to UNEs under federal law, is nevertheless so great that CLECs are unable to provide competition sufficient to discipline Verizon's retail prices. For this reason, as well as the reasons previously stated in AT&T's initial opposition to Verizon's pending motion to stay, it is essential that the Department continue its investigation into the state of competition in Massachusetts and its viability in the absence of CLEC access to unbundled network elements.

Indeed, such a conclusion follows from the Department's decision in D.T.E. 01-31, in which CLEC access to UNEs was fundamental to the Department's determination that Verizon's business rates could be price deregulated. In that case, the Department repeatedly stated that its conclusion that competition is sufficient to

² D.T.E. 01-31, Phase I (May 8, 2002), at 92.

³ *Id.*

discipline Verizon market power was based on CLEC access to UNEs. For example:

Both the FCC's goal of a transition to facilities-based competition and the Department's goal of economic efficiency will be best served by allowing Verizon upward pricing flexibility *for those retail business services that CLECs can compete against with their own UNE-based retail services.*⁴

If Verizon were to increase its prices above reasonable levels, CLECs could *enter the market through UNEs* at the same cost as Verizon and drive prices down to their economically efficient levels.⁵

Therefore, the Department determines that Verizon may, consistent with G.L. c. 159, be granted upward pricing flexibility *for its retail business services that are contestable on a UNE basis[.]*⁶

Moreover, it is possible that duplicate ubiquitous networks may never be developed by multiple LECs; therefore, *the ability to use UNEs as a profitable method of entry and expansion in Massachusetts is important to the development of competition.*⁷

More particularly, the Department finds that for resellers, and UNE-P and UNE-loop ("UNE-L") providers, supply elasticity is high; for other facilities-based CLECs, it is lower. If, under pricing flexibility, Verizon were to attempt to raise prices, market conditions for resellers and UNE-P providers with respect to most Verizon services are such that they could immediately put forth a competitive response that would force Verizon to lower its prices or suffer competitive losses.⁸

UNEs, including the UNE Platform, are priced at TELRIC rates, a pricing scheme intended to approximate efficient market-based pricing. Thus, by leasing UNEs, CLECs can enter the market with the same costs as Verizon (the incumbent firm), one of the two prerequisites for a market to be contestable (the other being costless exit). See Salvatore at 371. As Verizon points out, the ability to lease UNEs allows CLECs to enter the market without the high cost of building their own network facilities and to increase or decrease their supply of telecommunications services at will in response to price changes by Verizon.⁹

⁴ *Id.*, at 89 (emphasis supplied).

⁵ *Id.*, at 61 (emphasis supplied).

⁶ *Id.*, at 92 (emphasis supplied).

⁷ *Id.*, at 90 (emphasis supplied).

⁸ *Id.*, at 57.

⁹ *Id.*, at 59-60.

The Department's continuing jurisdiction over the reasonableness of Verizon's retail rates is not a matter of dispute. The ability of CLECs to enter the market and compete in the absence of access to UNEs is, therefore, a matter over which the Department has jurisdiction. The Department should continue its investigation into this essential issue.

Respectfully submitted,

Jay E. Gruber

cc: Service List